No. 86-90

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
THE UNITED STATES OF AMERICA, and
PACIFIC GAS AND ELECTRIC COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld as rational, supported by the record, and consistent with applicable regulations, the decision of the Nuclear Regulatory Commission not to hold hearings specifically to address the extraordinarily remote possibility of an earthquake disrupting offsite response to an independently caused radiological accident at the Diablo Canyon nuclear power plant.

PARTIES TO THE PROCEEDING BELOW

Pacific Gas and Electric Company, as the owner and operator of the Diablo Canyon Nuclear Power Plant, was intervenor-respondent below as of right pursuant to 28 U.S.C. § 2348 (1982). In accordance with Sup. Ct. R. 28.1, Pacific Gas and Electric Company notes that the following affiliates (excluding wholly owned subsidiaries) have an interest in the outcome of this case: ANGUS Chemical Company; ANGUS Petroleum Corporation; Pacific Indonesia LNG Company; Standard Pacific Gas Line Incorporated.

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BRIEF OF RESPONDENT PACIFIC GAS AND ELECTRIC COMPANY IN OPPOSITION

Since 1974, petitioners have opposed the licensing of the Diablo Canyon Nuclear Power Plant, raising various arguments before the Nuclear Regulatory Commission and its adjudicatory and appeal boards, a three-judge panel of the D.C. Circuit and the full court of appeals sitting *en banc*. After these exhaustive administrative and judicial proceedings, only one narrow issue remained before the *en banc* court of appeals—whether the NRC was required to hold additional adjudicatory hearings to consider, for purposes of local government emergency planning, the effects of a large earthquake coinciding with an independently caused radiological accident at the

plant, a combination of events so improbable "as to be, for any practical purpose, non-existent." Pet. App. A at 30.

Having twice failed to persuade the court of appeals that such additional adjudicatory hearings should have been held, petitioners now ask this Court to review an affirmance of what is essentially a factual decision by an administrative agency within its area of expertise. This case presents none of the factors that might ordinarily warrant this Court's review. There is no conflict among the circuits, no departure from this Court's precedents. And far from presenting an issue of potential widespread applicability, petitioners themselves have recognized that the issue here is applicable only to Diablo Canyon.[1] The petition should therefore be denied.

STATEMENT OF THE CASE

In *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), a panel of the court of appeals affirmed the decision of the Nuclear Regulatory Commission ("NRC" or "Commission") to license the Diablo Canyon plant for operation. A majority of the panel (Judges Wilkey and Bork) affirmed the Commission's determination that its emergency planning regulations do not require specific consideration (including adjudicatory hearings) of the extraordinarily remote pos-

[1] *See* Petitioners' Supplemental Brief On Rehearing En Banc, D.C. Cir. No. 84-1410, at 20 n.41, filed September 3, 1985: "[H]ere, the issue of concern . . . is and has always been of unique importance to California facilities and largely irrelevant to others." The only other nuclear facility which could conceivably be affected by this case is the San Onofre plant in southern California. But those proceedings were closed in 1983 and the earthquake/emergency planning issue, which arose first in that case, *see infra* page 4, was not appealed. The licensing of the San Onofre plant was affirmed in Carstens v. NRC, 742 F.2d 1546 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2675 (1985). *See also* GUARD v. NRC, 753 F.2d 1144 (D.C. Cir. 1985).

sibility of an earthquake occurring at the same time as a radiological accident at the plant and disrupting emergency response by offsite agencies and the public.[2] The full court of appeals subsequently granted rehearing *en banc* to consider this issue more fully,[3] but refused to stay the panel's decision upholding the operating license for the plant.[4] The court of appeals *en banc* affirmed the panel majority.[5] The full court upheld the Commission's interpretation of its emergency planning regulations, 10 C.F.R. § 50.47 and Part 50, App. E (1986), as entirely consistent with the language of the regulations and the

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[2] The Commission's decision ("Pet. App. B") was issued on August 10, 1984, CLI-84-12, 20 NRC 249, 252 (1984), contemporaneously with the Commission's decision licensing the plant for full power operation. CLI-84-13, 20 NRC 267 (1984). Earlier, in April 1984, the Commission had issued an order inviting the parties to comment on (1) whether the Commission's interpretation of its emergency planning regulations as not requiring consideration of earthquake complications should be reconsidered; and (2) whether there were "special circumstances" warranting such consideration in the case of Diablo Canyon. CLI-84-4, 19 NRC 937, 938 (1984). The Commission also noted that the local government emergency plans for Diablo Canyon provide some consideration of the effects of earthquakes and invited the parties to comment on the adequacy of these provisions. 19 NRC at 939. After considering the parties' responses, the Commission issued the August 10, 1984 order concluding that adjudication of the earthquake/emergency planning issue was not required or warranted in this case. 20 NRC 249.

[3] 760 F.2d 1320 (D.C. Cir. 1985). Rehearing *en banc* was also granted to consider petitioners' request to supplement the record with transcripts of closed Commission deliberations on the emergency planning issue. The *en banc* court, affirming the panel, denied petitioners' request to supplement the record. Pet. App. A at 39-40.

[4] Unit 1 of the Diablo Canyon facility has been in commercial operation since May 1985, and Unit 2 has been in commercial operation since March 1986.

[5] Judge Bork wrote for the *en banc* majority, joined by Judges Scalia, Edwards, Mikva and Starr, while the minority consisted of Judges Wald, Wright, Robinson and Ginsburg.

Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, both of which are silent on the earthquake/emergency planning issue. Pet. App. A at 9-23. The court further concluded that the Commission's decision not to hold an adjudicatory hearing on this matter was not arbitrary and capricious and that the reasons for its decision, as set forth in the Commission's opinion, were supported by conclusive evidence in the record. Pet. App. A at 23-39.

As the court noted, since this issue first arose in *Southern California Edison Co., et al.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-81-33, 14 NRC 1091 (1981), "the Commission has consistently interpreted [its emergency planning] regulations not to require specific consideration of the potential complicating effects of earthquakes." Pet. App. A at 10. The court found that interpretation entirely consistent with the regulations, which embody general standards for coping with a range of accident scenarios and offsite conditions rather than "any particular emergency or natural hazard . . . ." Pet. App. A at 11.[6]

The court of appeals rejected the petitioners' contention that the Commission acted arbitrarily and capriciously by excluding specific consideration of earthquakes in the emergency planning hearings, while adjudicating the effects of far more frequent natural phenomena such as fog and heavy rain. The court noted that the Commission's focus in applying the emergency planning regulations has always been on *frequently occurring* natural phenomena, and observed that this is a matter of line drawing by the expert agency (Pet. App. A at 23-24):

> [Petitioners'] contention rests upon the assumption that the probabilities of fog, heavy rain, and an

[6] The court also ruled that the Commission's interpretation of its regulations could not be viewed as inconsistent with the Atomic Energy Act, which has no provisions on emergency planning. Pet. App. A at 21.

> earthquake are similar. If the probabilities are not similar, it is rational to consider some but not others. At some point the probability of an occurrence becomes so infinitesimal that it would be absurd to say that a hearing about it is required.[7]

The court upheld the Commission's conclusion that, unlike fog or rain, the probability of either an earthquake-induced radiological accident or a simultaneous earthquake and independently caused accident is so low that specific consideration of these earthquake scenarios for purposes of offsite emergency planning is not justified. With respect to an earthquake-induced accident, the court upheld the panel's conclusion that the plant's approved seismic design rendered the probability of an initiating earthquake "so small as to be rated zero." Pet. App. A at 25-26 (quoting 751 F.2d at 1304 (footnote omitted)).[8] As for a simultaneous earthquake and independently caused accident, the court found the Commission's determination "conclusively" supported by the administrative record. Pet. App. A at 26. As the court recognized, the probability of such independent events occurring simultaneously is demonstrably on the order of "one in several tens of millions." Pet. App. A at 4. Finally, the court agreed with the Commission that its decision was bolstered by the inherent flexibility of the

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[7] In the Diablo Canyon case, the NRC considered the disruptive effects of dense fog and heavy rain, which were shown to occur frequently during the course of any given year. Pet. App. A at 34-35. Similarly, with respect to the Trojan plant located in Oregon, the NRC staff in November 1980 required consideration of volcanic eruptions at nearby Mt. St. Helens because a major eruption had recently occurred and scientific evidence indicated that further volcanic activity was probable. Pet. App. A at 38.

[8] The plant's ability to withstand the most serious earthquake vibrations postulated for the area was fully reviewed by the NRC and found adequate by the Atomic Safety and Licensing Appeal Board in a comprehensive 90-page opinion. ALAB-644, 13 NRC 903 (1981). Petitioners did not seek judicial review of the NRC's seismic safety decision.

emergency plans to accommodate a wide range of adverse conditions and to provide back-up systems for evacuation and communications that would help cope with any disruptions caused by an earthquake. Pet. App. A at 36-38.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present An Important Question Concerning The Public Health And Safety.

Diablo Canyon was licensed for operation on August 10, 1984,[9] after over fifteen years of administrative proceedings in which all safety aspects of the plant's siting and design were exhaustively considered. Pet. App. A at 5-7. A panel of the court of appeals affirmed the NRC's determination that the plant satisfied the requirements for licensing. 751 F.2d at 1287. In granting rehearing *en banc* on the emergency planning issue, the court of appeals refused to stay the panel's decision upholding the operating license for the plant. 760 F.2d at 1321.

In a calculated effort to draw this Court's interest, petitioners attempt to cast the decision below as one involving serious questions of public health and safety. But their safety arguments relate primarily to an issue that petitioners never appealed to the court below and that therefore is not presented here—Diablo Canyon's ability to withstand earthquake vibrations, *i.e.*, its seismic safety. In fact, the NRC found, after full adjudicatory hearings, in which extensive evidence on earthquake faults was considered,[10] that the plant is seismically safe

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[9] CLI-84-13, 20 NRC 267 (1984).

[10] Petitioners' characterization of the Hosgri fault as a "major active earthquake fault" is both inaccurate and misleading. The Licensing Board, after extensive hearings, concluded that it would be prudent to treat the Hosgri fault as "capable" within the meaning of 10 C.F.R. Part 100, App. A § III(g)(1), even though it was not a "major feature" of the region's tectonic structure, and "is not the kind of fault upon which one would expect a great earth-

in all respects at its present location. ALAB-644, 13 NRC 903 (1981), *petition for review denied*, CLI-82-12A, 16 NRC 7 (1982).[11] Petitioners chose not to challenge this seismic safety decision on appeal, and therefore cannot challenge the NRC's conclusion that the most severe earthquake postulated for the Diablo Canyon site does not pose a material threat to the plant. Pet. App. A at 26. The *en banc* court properly ruled that it had "no grounds" to re-examine the panel majority's conclusion "that the likelihood that an earthquake will trigger a nuclear accident at the facility is so small as to be rated zero." *Id.* (quoting 751 F.2d at 1304 (footnote omitted)).[12]

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quake, because it is too small and what can be observed of it does not indicate a past occurrence of major cumulative slip, at least during the last five million years." LBP-79-26, 10 NRC 453, 471-72 (1979).

[11] Diablo Canyon is located at one of the most remote sites of any reactor in the country, with only 16 residents within a five-mile radius of the plant.

[12] Contrary to petitioners' suggestion, the fact that the NRC required a seismic design that would successfully withstand the effects of a severe earthquake does not indicate that earthquakes of any size occur frequently enough to warrant special hearings on that subject for purposes of emergency planning. Every plant must be designed to withstand the effects of certain rare but severe natural phenomena, including the largest earthquake possible in the region, even though the probability of such phenomena is extremely low. 10 C.F.R. Part 50, App. A, Criterion 2, and Part 100, App. A. Emergency planning, however, has always focused on the complicating effects of frequently occurring phenomena in the region (*see supra* page 4 & note 7). In this case, notwithstanding the severity of the earthquake postulated for Diablo Canyon's seismic design, the NRC found that Diablo Canyon is located in a region of "low to moderate seismicity," ALAB-644, 13 NRC at 993-94; *see* Pet. App. B at B-7, i.e., not an area in which earthquakes occur frequently. As the NRC concluded, "earthquakes of sufficient size to disrupt emergency response at Diablo Canyon would be so infrequent that their specific consideration is not warranted." Pet. App. B at B-5.

The only issue addressed by the full court of appeals concerned emergency plans of offsite agencies and had nothing to do with the safety of the plant to operate. Specifically, the issue was whether those offsite emergency response plans must include specific scenarios in which transportation routes and communications facilities are impaired by earthquake damage, as opposed, for example, to rain-induced mudslides or other phenomena. Petitioners contend that the resolution of this issue by the NRC and the court of appeals constitutes a "wholesale nullification" of emergency planning for Diablo Canyon. Pet. at 18. This claim is wholly unfounded. After full adjudicatory hearings on all issues relevant under the emergency planning regulations, including the complicating effects of far more frequent natural phenomena such as heavy rain and fog, the NRC found that the emergency plans for Diablo Canyon satisfied all requirements for full power operation. LBP-82-70, 16 NRC 756, 763-92, 833-35 (1982), *aff'd*, ALAB-781, 20 NRC 819, 828-36 (1984). In an April 1984 order, *see supra* note 2, the Commission gave petitioners an opportunity to demonstrate deficiencies in the emergency plans with respect to any unique complications resulting from earthquakes. Yet petitioners failed to convince the Commission that there were any such safety issues warranting a hearing. Pet. App. B at B-6 to B-7.[13]

Both the panel and the *en banc* court of appeals upheld the Commission's decision, according proper deference to the agency's technical safety judgments. *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (in reviewing NRC's scientific determinations, courts must be at their most defer-

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[13] The NRC has wide discretion to establish the procedures governing what parties must do to obtain a hearing and on what issues they may be heard. *See generally* BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974). *Cf. San Luis Obispo Mothers for Peace*, 751 F.2d at 1318 (approving NRC standards for reopening hearing record).

ential); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (NRC findings to be set aside "only for substantial procedural or substantive reasons as mandated by statute"). In these circumstances, a re-examination by this Court of the technical merits of the NRC's safety determinations is unwarranted.

II. The Court Of Appeals Decision Is Entirely Consistent With Decisions Of This Court.

Of the numerous NRC determinations concerning the licensing of Diablo Canyon, the earthquake/emergency planning issue was the only substantive issue reheard *en banc*. The decision of the full court of appeals affirming the NRC involved no constitutional ruling, no broad issue of statutory interpretation, no legal ruling of unusual precedential import or widespread significance outside this case.[14] Indeed, the decision below involved a straightforward application of standard principles of judicial review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1982). Review by this Court is therefore inappropriate.[15]

Petitioners' principal argument for this Court's review is that the court of appeals supplied "an impermissible *post hoc* rationale" for the NRC's decision. Pet. at 11. In fact, the court of appeals not only carefully adhered to this Court's decisions delineating the limited role of a reviewing court and emphasizing the deference due an

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[14] As petitioners have conceded, this issue is of consequence in this proceeding alone. *See supra* note 1.

[15] As is the case with petitioners' arguments, nothing in the dissenting opinion suggests that this case is worthy of the Court's review. The dissent recognized that the emergency planning issue was relevant only to Diablo Canyon, Pet. App. A at 73-74, and agreed that "the only legitimate issue in this case is whether the Commission's line-drawing was rational . . . ." Pet. App. A at 60.

agency's interpretation of its regulations,[16] it specifically examined only the rationales articulated by the NRC.

Unlike the cases that petitioners rely upon, in this case the agency plainly stated the reasons for its decision not to hold a hearing on the earthquake/emergency planning issue: the extremely low probability of either an earthquake-initiated radiological emergency at the plant, given the plant's approved seismic design, or a simultaneous occurrence of an earthquake and an independently caused radiological release. Pet. App. B at B-3 to B-7 and B-12 to B-13.[17] The Commission also found its conclusions "bolstered" by the flexibility of the emergency

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[16] In reviewing the NRC's interpretation of its emergency planning regulation, the *en banc* court followed this Court's instruction that reviewing "courts are not at liberty to set aside an agency's interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations." Pet. App. A at 9-10 (citing United States v. Larionoff, 431 U.S. 864, 872-73 (1977); Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)). Moreover, the court rejected the dissent's approach of trying to ascertain—and fashion its own means to achieve—the underlying purposes of the regulations. (The dissent would have instructed the NRC that it must consider earthquakes in emergency planning. *See* Pet. App. A at 73-74; *see also* 751 F.2d at 1335.) The court noted that such an approach was inconsistent with "the controlling Supreme Court precedent." Pet. App. A at 11 n.2. *See, e.g., Baltimore Gas & Electric*, 462 U.S. at 103; *Vermont Yankee*, 435 U.S. at 558.

[17] Petitioners, for example, rely on Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983). There the Court overturned a decision by the National Highway Traffic Safety Administration to revoke a rule requiring automatic seat belts or airbags in motor vehicles, where the agency had "submitted no reasons at all" for not requiring airbags, failing even to "discuss[] th[at] possibility." *Id.* at 50. Similarly, they cite Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962), in which the agency provided "no findings and no analysis . . . to justify the choice" of one remedy for inadequate motor carrier service over other forms of relief under the governing statute, and gave "no indication of the basis on which the [agency] exercised its expert discretion." *Id.* at 167.

plans to deal with complications from various causes. Pet. App. B at B-5. Far from creating "an impermissible *post hoc* rationale" for the NRC's decision, the court of appeals did no more than determine that those reasons were rational and supported by the record as a whole. *See* Pet. App. A at 25. In affirming the agency's decision on that basis, the court explicitly noted that it could not "substitute its judgment for that of the agency." Pet. App. A at 24 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

Petitioners nevertheless claim that the court's opinion created a "*post hoc* rationale" because it contained certain mathematical calculations of probability not found in the more qualitative discussion of probabilities in the NRC's opinion. Pet. at 20-22. Every calculation in the court of appeals opinion, however, is based on data in the administrative record. Moreover, as discussed above, it was the NRC's rationale that specific consideration of earthquakes in emergency planning was not warranted in view of the exceedingly low probability of an earthquake causing or coinciding with a radiological emergency. The court of appeals properly performed a review of "the whole record," as required by the APA, 5 U.S.C. § 706 and decisions of this Court,[18] to determine if it adequately supported the reasoning of the NRC. Pet. App. A at 24.

Petitioners' argument essentially amounts to a request for a remand so that the agency can perform multiplication, based on data already in the administrative record, to support a decision which the agency has already explained in its opinion and which the court of appeals has twice upheld. The original panel of the court of appeals properly refused such a remand, noting that

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[18] *E.g., Motor Vehicle Manufacturers*, 463 U.S. at 43-44; Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974).

> [t]he only conceivable grounds on which the Commission can be faulted is that it failed to perform the final step in its mathematical analysis. Because the result is self-evident, however, we see no reason to delay operations at Diablo Canyon and demand that the Commission formally perform an elementary exercise in multiplication.

751 F.2d at 1308 n.115. That reasoning is entirely consistent with the principle established by this Court in *SEC v. Chenery.*[19] *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n.6 (1969) ("*Chenery* does not require that we convert judicial review of agency action into a ping-pong game" in which "meaningless . . . remand[s]" are required). As Judge Friendly has also noted, *Chenery*

> was intended only to establish the important point that a reviewing court could not affirm an agency on a principle the agency might not embrace—not to require the tedious process of adjudication and judicial review to be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings.[20]

Review by this Court is thus wholly unwarranted since, even if petitioners prevailed, it would culminate in a meaningless remand.

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[19] SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency").

[20] Erie Lackawanna R.R. v. United States, 279 F. Supp. 316, 354-55 (S.D.N.Y. 1967) (three-judge court), *aff'd and remanded sub nom.* Penn-Central and N&W Inclusion Cases, 389 U.S. 486 (1968).

CONCLUSION

This is a case in which the court of appeals has twice upheld the NRC's factual determinations and reasoning as rational and supported by the record. For this and the other reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

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